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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

JOEL KRIEGER, Individually and on Behalf
of All Others Similarly Situated,

Plaintiff,

vs.

ATHEROS COMMUNICATIONS, INC.,
DR. WILLY C. SHIH, DR. TERESA H.
MENG, DR. CRAIG H. BARRATT,
ANDREW S. RAPPAPORT, DAN A.
ARTUSI, CHARLES E. HARRIS,
MARSHALL L. MOHR, CHRISTINE
KING, QUALCOMM INCORPORATED,
AND T MERGER SUB, INC.

Defendants.

No. 5:11-CV-00640-LHK(HRL)

ATHEROS DEFENDANTS' REPLY
MEMORANDUM OF POINTS OF
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS FIRST
AMENDED CLASS ACTION
COMPLAINT

Judge: Hon. Lucy H. Koh

Hearing Date: May 31, 2012

Hearing Time: 1:30 p.m.

Location: Courtroom 4, 5th Floor

Date Action Filed: February 10, 2011

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1 **I. INTRODUCTION**

2 Plaintiff's opposition to the motion to dismiss the Amended Complaint is a
3 desperate Hail Mary pass hoping to extract attorney's fees for an effort that accomplished
4 nothing other than to burden the defendants with additional litigation on top of that which
5 was fully resolved in Delaware Chancery Court.

6 Plaintiff's claim under Section 14(a) and Rule 14a-9 stands or falls on the singular
7 question of whether the Definitive Proxy provided "a summary of the material financial
8 analyses undertaken by Qatalyst Partners in connection with rendering the Qatalyst Partners
9 opinion." This is the sole statement in the Definitive Proxy that is alleged to be false or
10 misleading. Am. Compl. ¶ 101.

11 Plaintiff purports to support this allegation by attaching as an exhibit to the
12 Amended Complaint a slide deck used by Qatalyst in making a presentation to Atheros's
13 board of directors and arguing that the Definitive Proxy's description of Qatalyst's analyses
14 did not provide a summary because it did not burden the Definitive Proxy with detailed data
15 from two tables that appear in that slide deck. One table, entitled "Summary of Analyst
16 Estimates & Valuation Methodologies," contains data drawn from the opinions of a number
17 of analysts who issued publicly-available research reports on Atheros. The second table,
18 located in an appendix to the slide deck, entitled "Historical Termination Fee Analysis,"
19 contains publicly-available data about termination fees in a large number of merger
20 agreements.

21 The Court has before it everything it needs to determine, as a matter of law, that the
22 Definitive Proxy did in fact provide a summary of the material financial analyses
23 undertaken by Qatalyst in connection with rendering its opinion and that therefore the
24 Amended Complaint should be dismissed for failure to state a claim. This determination
25 can be made by comparing the description of Qatalyst's analyses in the Definitive Proxy (of
26 which the Court may take judicial notice) to the slide deck (which is incorporated by
27 reference into the Amended Complaint) and applying to this comparison the plain meaning
28 of the word "summary."

1 **II. PLAINTIFF FAILS ADEQUATELY TO ALLEGE A FALSE OR**
 2 **MISLEADING STATEMENT**

3 As stated in the Atheros Defendant's opening brief, the PSLRA requires Plaintiff to
 4 "specify each statement alleged to have been misleading, the reason or reasons why the
 5 statement is misleading, and, if an allegation regarding the statement or omission is made
 6 on information and belief, the complaint shall state with particularity all facts on which that
 7 belief is formed." 15 U.S.C. § 78u-4(b)(1) (2010).

8 Plaintiff utterly fails to meet this pleading burden.

9 **A. The Analyst Data**

10 A summary is a "brief account giving the main points of something." The Oxford
 11 Dictionaries (<http://oxforddictionaries.com/definition/summary>). "[A] 'summary' is
 12 ordinarily understood to be an "abstract, abridgment, or compendium. . . ." *Kristensen v.*
 13 *Spotnitz*, 2011 U.S. Dist. LEXIS 59740 (W.D. Va. June 3, 2011), citing Merriam Webster's
 14 Collegiate Dictionary 1179 (10th Ed. 1993) (holding that a party failed to provide a
 15 summary of the facts and opinions to which the witness is expected to testify as required by
 16 Fed. R. Civ. P. 26(a)(2)(C) when it filed the complete medical records of the treating
 17 physicians). As noted in the opening brief, the Definitive Proxy accurately stated that
 18 Qatalyst considered certain publicly-available estimates by stock market analysts; thus, the
 19 proxy summarized Qatalyst's analysis of this material. Plaintiff seeks to turn the notion of
 20 a summary on its head by arguing that a summary must include every bit of data reviewed
 21 or considered by Qatalyst. That is not what a summary consists of. That is the opposite of
 22 a summary.

23 Plaintiff cites no case to support the assertion that detailed data about publicly-
 24 available analyst reports is required to provide a summary of the analyses performed by a
 25 financial advisor. *Laborers Local 235 Benefit Funds v. Starent Networks Corp.*, No. 5002-
 26 CC, 2009 Del. Ch. LEXIS 210 (Del. Ch. Nov. 18, 2009) says nothing of the sort. In that
 27 case the Court of Chancery ordered expedited discovery where the target's financial advisor
 28 had inexplicably treated stock-based compensation as a cash expense in performing a

discounted cash flow analysis, while treating it as a non-cash expense for purposes of two other analyses. The case had nothing to do with disclosure of details of published analyst reports. *In re Pure Resources, Inc. Shareholder Litig.*, 808 A2d 421 (D. Ch. 2002) stands for the proposition that under Delaware’s exacting fiduciary standards, stockholders are entitled to a fair summary of the substantive work performed by the target board’s financial advisor. It says nothing about providing detailed data from opinions published by unaffiliated stock market analysts. In any event, this action asserts only claims under the Federal securities laws prohibiting false and misleading statements, not under Delaware fiduciary standards – which *were* applied by the Delaware Court of Chancery in determining that “The Proxy Statement contains a detailed summary of Qatalyst’s fairness opinion.” March 4, 2011 Memorandum Opinion at p. 26 (Furbush Decl. Exh. 4).

B. The Breakup Fee Data

Plaintiffs do not and cannot allege that the breakup fee data was a material part of Qatalyst’s analysis of the fairness of the merger consideration, from a financial point of view, to Atheros’s shareholders, which was the sole opinion rendered by Qatalyst. “The Qatalyst Partners opinion...addresses only the fairness, from a financial point of view...of the \$45 per share cash consideration...and does not address any other aspect of the Merger.” Definitive Proxy, p. 28.

Plaintiff cites two cases for the proposition that “courts routinely find misstatements and omissions regarding termination fees material”: *Brazen v. Bell Atl. Corp.*, 695 A.2d 43 (Del. 1997) and *R.S.M., Inc. v. Alliance Capital Mgmt. Holdings*, 790 A.2d 478 (D. Ch. 2001). In both cases, the plaintiffs alleged that defendants had misstated or failed to disclose *the actual termination fee in the deal being presented to stockholders for approval*. This information was deemed material to shareholders in deciding how to vote, but had no bearing on whether a summary had been provided of the analyses underlying the fairness opinion. In any event, the allegedly omitted information here is not the termination fee in this transaction – which was clearly and accurately disclosed in the Proxy – but rather data about termination fees in dozens of unrelated transactions. Plaintiff cites no case holding

1 that data of the latter type must be disclosed in order to provide a summary of the analyses
 2 performed by a financial advisor in reaching an opinion on the fairness of the merger
 3 consideration, especially where the advisor expressly does not provide an opinion about the
 4 fairness of the termination fee.

5 **III. PLAINTIFF FAILS TO PLEAD FACTS GIVING RISE TO A STRONG**
 6 **INFERENCE OF NEGLIGENCE**

7 Plaintiff concedes that he is required to plead facts that give rise to a strong
 8 inference of negligence. The only “facts” plaintiff points to as supporting this requirement
 9 are that “the Atheros Defendants were presented with the ‘Summary of Analyst Estimates
 10 & Valuation Methodologies’ and ‘Historical Termination Fee Analysis,’ but decided not to
 11 include these analyses with the Definitive Proxy.” These facts do not even suggest
 12 negligence, let alone provide a strong inference of it. To the contrary, these facts are
 13 perfectly consistent with the conclusion that the Atheros Defendants reasonably concluded
 14 that it was not necessary to provide this detail in order to give a summary of the material
 15 financial analyses supporting the fairness opinion.

16 **IV. PLAINTIFF FAILS TO PLEAD ECONOMIC LOSS PROXIMATELY**
 17 **CAUSED BY THE ALLEGED OMISSIONS**

18 As the Ninth Circuit recently held, to state a claim under Section 14(a) and Rule
 19 14a-9, a plaintiff must establish three distinct things: that “(1) a proxy statement contained
 20 a material misrepresentation or omission which (2) caused the plaintiff injury and (3) that
 21 the proxy solicitation itself, rather than the particular defect in the solicitation in the
 22 materials, was an essential link in the accomplishment of the transaction.” *New York City*
 23 *Employees Ret. Sys. v. Jobs*, 593 F.3d 1018, 1022 (9th Cir. 2010). Though Plaintiff alleges
 24 that the Definitive Proxy was instrumental in causing the merger to be approved by
 25 shareholders, the Complaint does not satisfy the requirement that the alleged omission in
 26 the Definitive Proxy “caused the plaintiff injury.” The Ninth Circuit made clear that under
 27 the PSLRA such an injury must be an *economic* injury: “To show loss causation, a plaintiff
 28 must prove both economic loss and proximate causation.” *Id.* at 1023. Plaintiff fails to

1 allege *any* economic loss that was proximately caused by the alleged omissions described in
 2 the First Amended Complaint.

3 **V. PLAINTIFF FAILS TO ALLEGE A CLAIM UNDER SECTION 20(a)**

4 Having failed to allege a primary violation of Section 14(a) or Rule 14a-9, plaintiff's
 5 allegation of secondary liability under Section 20(a) necessarily fails.

6 **VI. PLAINTIFF'S CLAIM FOR AN AWARD OF ATTORNEY'S FEES IS**
 7 **PREPOSTEROUS**

8 Plaintiff's request that he be awarded attorney's fees in this case for disclosures
 9 ordered by the Delaware Court of Chancery is preposterous. Plaintiff made a half-hearted
 10 motion for a preliminary injunction in this case based solely on state law claims. The
 11 motion was denied by this Court and plaintiff subsequently abandoned the state law claims
 12 on which the motion was based. Plaintiff's prosecution of his federal law claims in this
 13 Court has produced no benefit whatsoever to any shareholder of Atheros. If plaintiff
 14 seriously maintained that his efforts contributed to the Delaware Court's preliminary
 15 injunction order, he was free to ask the Court that issued that order to award him attorney's
 16 fees. The fact that no such application was made speaks volumes about the credibility of
 17 plaintiff's claim for a fee award.

18 Plaintiff resorts to arguing that "a motion to dismiss is not the proper forum to
 19 challenge the factual allegations in the complaint." This is not a correct statement of the
 20 law. The Court need not accept as true obviously implausible factual assertions, especially
 21 when they are contradicted by documents of which the Court may take judicial notice, such
 22 as the Opinions of the Chancery Court (Furbush Decl. Exhibits 4 and 5) and the
 23 Supplemental Disclosures (Furbush Decl. Exhibit 3), which plainly demonstrate that the
 24 Supplemental Disclosures were made specifically and solely to comply with the Chancery
 25 Court's order of March 4, 2011. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

1 **VII. CONCLUSION**

2 For the reasons stated above, the Amended Complaint should be dismissed. As
3 there is no plausible way in which the defects can be cured, the dismissal should be with
4 prejudice.

5
6 Dated: May 3, 2012

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